Excerpts from the reporter's transcript of the preliminaryhearing in *People v. Stanley Williams and Tony L. Sims*, Los Angeles County Superior Court case number A194636 (pages 1 through 24, 106, 107)

SER 590 - 616

IN THE MUNICIPAL COURT OF INGLEWOOD JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

DIVISION NO. 4 HON. DESMOND J. BOURKE, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. STANLEY WILLIAMS and TONY L. SIMS, Defendants.	NO. A194636 F23495 VIOLATION SECTIONS: Count 1: 187-Williams Count 2: 187-Williams Count 3: 187-Williams Count 4: 211-Williams Count 5: 207-Williams Count 6: 211-Williams Count 7: 187-Both Defendants Count 8: 211-Both Defendants ALL PENAL CODE 5-3-79 Sw L+3 FELONIES

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REPORTER'S TRANSCRIPT OF PRELIMINARY HEARING

Wednesday, April 18, 1979
Thursday, April 19, 1979

APPEARANCES:

For the People: JOHN K. VAN deKAMP, District Attorney
BY: ROBERT MARTIN
Special Assistant District Attorney
825 Maple Avenue
Torrance, California 90503

For Defendant Williams: HARRY E. WEISS
8730 Sunset Boulevard
Los Angeles, California 90069

For Defendant Sims: ALLEN J. WEBSTER, JR.
Suite 200
945 South Prairie Avenue
Inglewood, California 90301

J. A. GATIGLIO, CSR #1148
Official Court Reporter
One Regent Street
Inglewood, California 90301

ORIGINAL

I N D E X

ALPHABETICAL INDEX

--- CONTINUED ---

E X H I B I T S

PEOPLE'S		IDENTIFICATION	EVIDENCE
1	Photograph: Victim 1	29	229
2	Photograph: Victim 2	29	229
3	Photograph: Victim 3	29	229
4	Photograph: Brookhaven Motel	30	229
5	Photograph: Door with locks	37	229
6	Photograph: Motel sign	41	229
7	Photograph: Shotgun shell casing	47	229
8	12 gauge shotgun	66	229
9	Evidence envelope with 4 small envelopes	97	229
9-A	Coroner's envelope, lead pellets	97	229
9-B	Coroner's envelope, lead pellets	97	229
9-C	1 expended 12 gauge shot shell	97	229
9-D	1 expended 12 gauge shot shell	97	229
9-E	1 expended 12 gauge shot shell	98	229
10	Photograph: male, deceased	132	229
11	Photograph: Car with broom/dustpan	134	229
12	Photograph: Body on floor	134	229
13	Photograph: Inside of market	135	229
14	Photograph: Cig butt and shell casing	135	229
15	Photograph: Boxes and shell casing	137	229

INGLEWOOD, CALIFORNIA; WEDNESDAY, APRIL 18, 1979; 9:45 A.M.

- - -

THE COURT: We are on the record in the case of People versus Stanley Williams and Tony L. Sims.

Are the People ready to proceed in this preliminary hearing?

MR. MARTIN: Yes.

MR. WEISS: Mr. Williams is present in court with attorney, Harry Weiss.

We are requesting a continuance in this matter --

THE COURT: I don't recognize you as attorney of record.

At the last hearing, two weeks ago, the defendant Williams told me that his attorney was Sammy Weiss.

Who, Mr. Williams, do you wish to have represent you as your attorney?

As you recall originally, when you first came into court three weeks ago for arraignment, because you were indigent, the court did appoint the public defender, Mr. Shannon of the public defender's office, who has been representing you.

At the last minute, Mr. Weiss, Sammy Weiss, appeared two weeks ago, and I thought that you told me that you thought that you wanted to have him as your attorney.

Now, Mr. Harry Weiss is here.

Do you want Mr. Harry Weiss to represent you in this matter?

DEFENDANT WILLIAMS: Either one. They are both the same, aren't they?

THE COURT: They have got the same last name.

Do you want Mr. Harry Weiss to represent you today? If you tell me "yes" --

DEFENDANT WILLIAMS: Whichever one was paid for.

THE COURT: I don't care.

I didn't pay for them.

DEFENDANT WILLIAMS: I am confused.

THE COURT: It was represented to me that, by Mr. Weiss, Mr. Sammy Weiss, that your family had made arrangements financially to hire a lawyer, Mr. Weiss.

I guess it is Mr. Harry Weiss.

Is that what you want?

You are the one who has to tell me who is the lawyer of your choice; not your family.

DEFENDANT WILLIAMS: Right here.

THE COURT: Mr. Harry Weiss will be your attorney.

Show Mr. Harry Weiss as attorney of record.

MR. WEISS: I am requesting a continuance in this matter, because we had not completed discovery on this matter.

Discovery was requested and was not forwarded to the office. This being a very serious charge, as your Honor knows from the very nature of the complaint itself, it needs further detailed preparation on this matter.

There is an investigator working on the case at this time. He has not completed his investigation to us, and therefore, we respectfully request a continuance in this case.

MR. MARTIN: I am in receipt of a discovery motion.

That motion, according to the Weiss office, was to be heard last Wednesday. Nobody from the Weiss office

showed up in court to hear that motion.

I called Sammy Weiss' office and was told by a person, Frank, there, that Mr. Harry Weiss was going to handle the motion, because Sammy Weiss was out of the state, and that Mr. Harry Weiss was prevented from being here, because he was caught up on the freeway or something of that nature.

As a result of that, the motion has not been heard by the court, as yet.

On April 16, I wrote a letter to Mr. Sammy Weiss. I sent him further items, six items of discovery, which he had received since our last court appearance, and I mentioned the fact that no one showed in Judge Vassie's court on April 11 at 2:30 p.m., when the motion was to be heard.

THE COURT: The record will also show that no one appeared in my court, where it was noticed at 1:30 on that day.

MR. MARTIN: I do understand that this case is a complicated case, and it is an extremely serious case, and therefore, it is not the People's object, in any way, to introduce error or to deny the defendant the rights that he has, and therefore, I am simply informing the court of the procedure that I am aware of up to this point, so that the record can be clear.

THE COURT: I have looked over the motion, which was filed with the court, stamped in on, "April 4, 8:21 a.m., Margaret Tollefson, Clerk."

It has been in the file ever since then, and while it appears to be boiler plate, I think you would have to agree with me, with the exceptions of number 15, and item 19, calling

for the rap sheets of all witnesses, that information is discoverable.

Wouldn't you agree?

MR. MARTIN: I would like to go through it --

THE COURT: May I see a copy of your letter?

Did you offer Mr. Weiss discovery informally?

MR. MARTIN: Yes.

May I approach the bench?

THE COURT: Surely.

MR. MARTIN: We have made discovery available, and as the defense counsel knows from the previous reports, there are a number of tapes of witnesses, including defendant Williams, and there has been no approach by the defense counsel to go to the sheriff's office, in order to either listen to those tapes or to make their own recordings of the tapes.

THE COURT: Mr. Weiss, you made the statement that discovery was requested and not forwarded.

How did you request that?

MR. WEISS: By the phone messages on our sheet, as well as by the formal motion.

We understand from your calendar clerk, that recorded messages are as follows:

That we were to send a driver certain places, or somebody from the office, and they would deliver these tapes to them, which we were, in turn, to turn them over and have them recorded on our own tapes, and secondly, if we returned them to the district attorney's office, that they would give up discovery.

They would furnish us with it to anyone in our office with proper authority. We sent our Barry Green out to both of these places.

He picked up certain items from the district attorney's office; not all of the items.

The tapes were not made available, either by duplicate tapes or by the release of the tapes to the investigator to have them copied.

THE COURT: I will probably solve your problem.

How long do you think that this preliminary hearing is going to take?

MR. MARTIN: Probably two or three days, and I would like to say --

THE COURT: Are you willing to engage in informal discovery during the proceeding of the preliminary hearing, in other words, make information available to Mr. Weiss as we go along?

MR. MARTIN: Well, I would like to make one statement, if I may.

I think Mr. Weiss knows and the public knows that ever since Watergate, tapes are not released to defense counsel to take with a driver and do something with; however, those tapes are available for inspection, for recording, and for listening to, while they are in the custody of the sheriff homicide department.

Second of all, if we could have some commitment that Mr. Weiss, starting as of now, would care to listen to those tapes and to take the discovery that we have, prior to the preliminary hearing, perhaps, it could be done with some

dispatch.

MR. WEISS: If I may, it is not only the securing of the tapes. This is only one phase for the request of the continuance.

I think that the district attorney stated, accurately, to your HOnor, prior to his opening statement, that this requires a extensive investigation.

It is a very strange case, with many, many aspects. On an ordinary preliminary hearing, I know from the years of experience that you have had, that you could probably do it on your ear, but this is not this type of case, and we are not malingering.

I think that both the district attorney's office and counsel would be subject to great criticism, if more detailed investigation was not done in this matter prior to preliminary hearing.

THE COURT: Mr. Shannon, you are excused, at the request of the defendant.

Mr. Weiss has indicated, of record, as his attorney.

Thank you very much for coming to court.

MR. WEISS: May I inquire of the public defender, if the public defender's office has given our office everything, in his possession, that belongs to the defendant, through his previous discovery?

THE COURT: Mr. Shannon is about to do just that.

MR. SHANNON: These are just police reports.

THE COURT: Would you mind stating, on the record, what you are giving him.

MR. SHANNON: These are the original copies of the reports that I was given.

THE COURT: At the time of arraignment?

MR. SHANNON: Yes, your Honor.

And this is the original complaint that was filed.

MR. WEISS: Thank you, Mr. Shannon.

THE COURT: The court appreciates your attendance.

You are now excused.

MR. WEISS: What I was about to say is we are not asking for a lengthy continuance.

The investigator's report should be completed within a week, and the investigator indicates that it can be done.

That is the thought in mind here, and I think because of the nature, that is, the punishment required here, I think all persons involved would be subject to great criticism, if this was not completed.

I talked to co-counsel, and he has no objection to a continuance in this matter, if his Honor will accommodate counsel and the defendant.

MR. MARTIN: If the court entertains that, because of the nature of the case, one of the difficulties is --

To grant a reasonable continuance, there should be a date certain, and in which all parties agree that there be no excuses or running out of reasons.

In a case of this kind, there are reports that come in a little bit late, however, we are turning over to defense counsel everything that we have.

MR. WEISS: With a date certain to be picked, there would

be no other delay.

THE COURT: My problem is this, Mr. Weiss:

You have known for three weeks that you were the attorney of record in this case, and you had three weeks to prepare this case.

This is a preliminary hearing. It is different than a trial. If you requested to continue the trial date, of course, I would grant it.

There is no good cause to ever cause an attorney to go to trial, until he has had the adequate chance to fully prepare, particularly, a case that might involve the death penalty, but I am looking at the mandate of the public policy of California, as expressed in 859b:

> "Both the defendant and the People have a right to a preliminary hearing at the earliest possible time, and unless waived or good cause for continuance is found, pursuant to Penal Code Section 1050, the only way to continue it beyond ten days is by personal waiver from the defendant."

And Penal Code Section 1050, which further states:

"The public policy of the State of California" -- which I must carry out -- "both the People and the defendant have a right to an expeditious disposition of any criminal matter."

It doesn't say criminal trial.

> "And it is the duty of the court, counsel, and even counsel for the defendant to expedite, to the greatest degree, consistent with the ends of

justice, and in order to continue any hearing in a criminal procedure, written notice must be filed within two days, and an affidavit in support thereof, showing the detailed facts in support of the continuance, must be given."

I find that you have failed to comply with both 859b and 1050.

Your motion to continue is denied.

MR. WEISS: Thank you.

THE COURT: Are you ready for the preliminary hearing?

MR. WEISS: Ready, as previously stated.

THE COURT: Ready on the condition, previously stated?

MR. WEISS: Yes.

MR. MARTIN: I wonder, on the notice of motion for discovery, could we hear that now?

THE COURT: Surely.

Do you have your copy of the motion, Mr. Weiss?

I will read it, as we go along, if you like.

MR. WEISS: My driver will get it right away.

THE COURT: I should take the appearance of co-defendant.

Mr. Webster, ready for the preliminary hearing?

MR. WEBSTER: Allen Webster, representing the defendant Sims.

We are ready.

THE COURT: What is your position with the discovery?

MR. WEBSTER: We join.

THE COURT: The Supreme Court doesn't like to say so, but a preliminary hearing is a part of the discovery

process, and there will be discovery going on.

You will be given great latitude, as far as cross-examination goes, within the limits of the evidence code, and I really feel that we could gain a lot of ground, as we go over these items.

If the district attorney would keep in mind that, which he feels is discoverable, he will make it available.

We have attorney conference rooms, two of them outside. The district attorney can meet with you out there. You can listen to recordings. You can bring your own tape along and come into court during recess.

MR. MARTIN: Before we begin, if Mr. Weiss is not in receipt of my letter and those additional items, we can go out into the office and make those available to him.

THE COURT: I propose that we go along with the notice of motion, the motion for discovery, and decide what items would be objected to, and those that would be granted, and then take a brief recess, and go over that briefly before we start the preliminary hearing.

You will probably need your letter back.

MR. MARTIN: Yes.

THE COURT: Mr. Weiss, do you have a copy of that now?

MR. WEISS: Not of the letter, but of the discovery motion, yes, I do.

THE COURT: Item 1, is there any question about providing that?

It is "all oral and written statements and/or admissions allegedly made by defendant, whether

signed or unsigned."

MR. MARTIN: As far as the oral statements, to the extent that the oral statements are either tape recorded or in written form, we would say that we have no objection.

THE COURT: Granted, as recorded or written.

Item 2, "All tape recordings made of statements or conversations of the defendant."

That is the same thing.

MR. MARTIN: There, we would just say that those tape recordings are available at the sheriff's homicide bureau downtown, and they can be either listened to, or they can be re-recorded.

THE COURT: Who is this gentleman who is sitting here with you at the counsel table?

MR. MARTIN: This is Deputy Sheriff James Solar, who is the investigating officer, on one of the cases.

THE COURT: Would he be able to order these recordings out to the court from the sheriff's lab?

MR. MARTIN: Yes.

THE COURT: So that they could be listened to in our attorney conference room.

MR. MARTIN: They could be listened to here, as long as there is a member of the sheriff's department present.

MR. WEISS: What has been done in the past is that the district attorney is supposed to be one office of Los Angeles County in that they have always said, "You pay us for the tapes, and we will give you a copy of the tapes."

If there is a different rule, out here, I am not

aware of it.

THE COURT: If you want to pay him --

MR. WEISS: They have the equipment to run the tapes off.

MR. MARTIN: We feel, in this instance, that the normal procedure, that is followed by the sheriff's office, is that the discovery calls for --

In other words, inspection of the documents, inspection of the tapes.

They can either sit and listen to those tapes, or they can bring their own recording equipment and record the tapes for themselves.

That is their choice.

THE COURT: Mr. Weiss, have your recording equipment brought here to Division 4, and we will make the electricity to you available at no charge.

MR. WEISS: The district attorney has it.

They have spent county money, which is our tax payers money, and both defendants are entitled to the use of this equipment.

It is not especially for the investigator. It is for all of us, and it should not be made that burdensome for the defendant to go spend $1,000 to get some electronic company to record it.

If you do it otherwise, it is not audible. As I say, it is being petty on the part of the district attorney's office and the sheriff's department to do it here, when it is done for every other defendant.

THE COURT: Deputy Solar, is that a fact? Do you make

an extra tape, a recording of the tape recording of confessions and admissions, statements of witnesses, at county expense?

DEPUTY SOLAR: No.

MR. WEISS: The district attorney does.

They turn it over to the district attorney's office.

THE COURT: The district attorney does not have in his budget some of the things, that I have, on order for him.

MR. WEISS: They have in their department a complete floor with electronic equipment to record this.

THE COURT: Mr. Weiss, as I understand discovery, and I could be short on this, but criminal cases apply to the same things. All the People is required to do, under discovery, is to make available , for your ears, the tape recordings made of conversations with your client, the defendant.

HOw you want to copy them, is your problem and at your expense.

The People of the County of Los Angeles are not required, at their expense, to provide you with a copy of the tape recordings. So, what you are going to get informally is the tape recording made out in the attorney conference room, and you can bring your own equipment here to copy it.

I will give you my tape recorder. It will copy it. It is only a $40 job.

MR. WEISS: It didn't work for us.

We will try it.

THE COURT: All you have got to do is hold the microphone somewhere near the recorder.

Deputy Solar, would you order thesethings to be

brought out to court, as soon as possible, during the preliminary hearing?

If you don't mind, Mr. Martin.

MR. MARTIN: No.

THE COURT: Number 3, "All written statements made by witnesses, whether signed or unsigned."

Granted?

MR. MARTIN: No problem.

THE COURT: Granted, and to be produced during the proceedings.

Item 4, "All tape recordings made of statements or conversations of witnesses."

Again, no objection?

MR. MARTIN: No objection.

THE COURT: Number 4, granted.

Number 5, "Results of any and all laboratory tests of the scientific investigation department, Los Angeles County, concerning any examination of physical, photographic or written evidence connected with the investigation of the within case, together with any and all written reports concerning said evidence."

MR. MARTIN: On that one, we do have shell casings, which the defense counsel are welcomed to inspect. If they are going to have any further tests, they must be done in the presence of the scientific services bureau of the sheriff's department, but that all reports from that bureau and the materials themselves are available for inspection.

THE COURT: Will you show him a report concerning said shell casings? And other evidence?

MR. MARTIN: Of course, we will.

THE COURT: It will probably come out in the preliminary hearing, anyway, won't it?

MR. MARTIN: YEs.

THE COURT: Granted, within the limits indicated by Mr. Martin.

Number 6, "Photographs of latent fingerprints discovered and lifted at the scene; latent fingerprints found at the scene of the crime; and any written reports of comparisons made."

Any objection?

MR. MARTIN: Whatever latent fingerprints have been lifted, they will be available for inspection, and of course, any written reports of comparisons made will be available.

THE COURT: Granted, as indicated.

Mr. Weiss, if you see anything that you feel is short of what you are asking for, you let me know.

MR. WEISS: I shall.

THE COURT: Number 7, "Any and all photographs taken of the defendant, or any portion of his body, connected with this alleged offense."

MR. MARTIN: "Connected with this alleged offense," I take it to mean at the scenes of the crimes, that have been committed.

THE COURT: No objection, if it is limited to that?

MR. MARTIN: No.

THE COURT: I don't think that you took any Mr. America photos.

Number 8, "Any and all photographs taken of the scene of the crime and/or of the victims of the crime, or otherwise relating to this case."

Any objection?

MR. MARTIN: The photographs, which we have, will be produced at the preliminary hearing.

THE COURT: And counsel will be allowed to see them beforehand?

MR. MARTIN: Yes.

THE COURT: Number 9, "Photographs that have been exhibited to the victim for the purpose of establishing the identity of the perpetrator of the crime."

I understand this is a murder case, so the victim couldn't really be looking at photographs.

MR. MARTIN: We do have one robbery and kidnapping, and any photo folder, that was used, of course, would be introduced.

THE COURT: No objection?

MR. MARTIN: No objection.

THE COURT: Granted.

Number 10, "All notes or memoranda, handwritten or typed, by police officers or other investigating officers of their conversations with the defendant."

That enters into numbers 1 and 2?

MR. MARTIN: Yes.

THE COURT: No objection?

Anything in writing, anything typed; right?

That would include any summary of any conversation that wasn't originally in writing, but it was summarized and typed up by any deputy or any member of the sheriff's office?

MR. MARTIN: Correct.

THE COURT: Number 11, "All notes or memoranda, handwritten or typed, by police officers or other investigating officers of their conversations with persons pertaining to the investigation into this matter."

That is pretty broad.

It would be conversations with the district attorney, which you would claim privilege?

MR. MARTIN: WE would object to "persons," whether they be relevant or irrelevant, that is, any witnesses that the People are going to produce, conversations with them, and if there are any handwritten notes, they would be made available.

THE COURT: Limited, and to be produced by the People?

MR. MARTIN: Yes.

THE COURT: Any objection?

MR. WEISS: That is not discovery.

That goes back to that case a few years ago, where the district attorney was criticized for not giving everything.

He is not the judge. Everything that he has must be given to a person with a jaundice or unjaundice eye to exa mine, and I don't want to lead the court or the district attorney there. That is not the case.

Everything that he has must be given for examination.

Anything that came, as a result of his investigation in this case, must be turned over to the defendant.

THE COURT: If the deputy sheriff went off, that is, Deputy Solar went off and talked to the district attorney in confidence about this matter, that will not be turned over to

There is still an attorney-client privilege. Any conversations recorded by any police officer of any persons during the investigatory incident of this case is discoverable, whether he is going to be called as a witness or not.

MR. MARTIN: I think one of the problems is that in the notes of the investigating sheriffs are addresses, and we are not going to reveal the addresses of those particular individuals, and therefore, if it was a complete handing over of those notebooks, we would be putting witnesses in jeopardy, and consequently, we would like to do that under controlled conditions, whereby the deputies have a chance to duplicate their notes and to cross out certain addresses, but other than that, the information --

THE COURT: With those addresses deleted, with the understanding that the district attorney will be required to produce those persons at any time, do you agree?

MR. WEISS: Satisfactory.

THE COURT: Deleting the addresses, then, deputy Solar, and of course, deleting the home address of any police officer or deputy sheriff.

Number 12, "All transcripts made of tape recordings of statements made by the accused and by prosecution witnesses."

MR. MARTIN: Those would be work products on the part of the People.

The tapes are available for inspection and for listening, and that any transcripts, that are made, are work products, and would not be discoverable.

That is secondary information. The best evidence here are the tapes themselves.

THE COURT: Mr. Weiss, you will have to make your own transcript.

Number 12 is denied, as such.

Objection by the district attorney that the transcript itself if the work product of the district attorney or the County of Los Angeles Sheriffs.

Number 13, "Names and addressses of all witnesses to, or who have knowledge of, the crime or the events leading to the commission thereof."

Mr. Martin, for reasons which you have expressed, the identity of, at least, the location and addresses of these witnesses, from the standpoint of privilege, is claimed; right?

MR. MARTIN: Yes.

We will provide names.

THE COURT: Mr. Weiss, any objection?

MR. WEISS: Satisfactory, under the controlled conditions as the district attorney previously stated.

THE COURT: Granted, except addresses and home addresses will not be given of any witness.

Number 14, "Copy of crime report, together with copies of all reports written by officers

investigating the crime involved in the above-entitled action."

I think that you have that now.

MR. WEISS: Yes.

THE COURT: Number 15, "Record of arrests and convictions of the defendant and of witnesses named pursuant to paragraph 13 hereof, furnished to investigating or prosecuting agency by the Attorney General of the State of California or by the Federal Bureau of Investigation."

MR. MARTIN: WE would object to that.

That is calling for rap sheets, that we are not within the law in providing such things; however, we would state, for the record, that where witnesses or other individuals involved in the case, have been convicted of a felony, we would make that information available to the defense counsel.

MR. WEBSTER: Satisfactory.

MR. WEISS: Satisfactory.

THE COURT: That was number 15.

Granted as indicated by the district attorney; otherwise, denied, as to number 15.

I might say, also, to both counsel for the defendants that the district attorney may object, but you may ask any witness in my court, "Have you ever been convicted of any felony."

MR. WEISS: Thank you.

MR. WEBSTER: Thank you.

THE COURT: As to it being admissible at trial, you can

worry about that later.

Number 16, "Names and addresses of all persons the People expect to call as witnesses at the trial."

MR. MARTIN: Again, that would be names.

THE COURT: That has already been supplied?

MR. MARTIN: I don't know.

THE COURT: Usually, with the subpoena, all witnesses are named, whether you call them at the preliminary hearing or not. If there are any others, you will supply them?

MR. MARTIN: Yes.

THE COURT: Granted.

Number 17, "Names and addresses of all persons arrested as suspects in the investigation of the above-entitled case."

MR. MARTIN: Again, that would be names.

THE COURT: Names only.

Granted as to names only.

No addresses.

Number 18, "Names and addressses of all persons interviewed by the district attorney's office, its investigators or agents, the Los Angeles Police Department, or any other law enforcement agency known to the district attorney or his representatives in relation to this case."

MR. MARTIN: We think this is much too broad as to the district attorney's office, police departments, or what have you.

Whatever information we have, as the people who were spoken to and any statements that were taken and were

recorded, we would, of course, make that available to the defense.

I think all of those names and all of those people are ready in the materials and the eports written by the sheriff's department, and therefore, any names, any statements, that we have, would of course, be made available to the defense.

THE COURT: Any objection?

MR. WEISS: No objection.

THE COURT: Granted, as indicated.

Number 19, "All rap sheets of the potential witnesses incarcerated at the time the defendant was being charged."

Incarcerated where?

In the County of Los Angeles?

Do you want everyone who is in jail at this time?

MR. WEISS: There were certain people that were arrested and placed as possible suspects.

MR. MARTIN: We have covered that above, and again, it is asking for rap sheets, and we cannot provide that.

MR. WEISS: They can be used by saying, "have you ever been convicted of any felony."

THE COURT: Granted.

Do you need about a half hour or so to go over some of this material before we call the first witness, or do you want to do it at the recess?

Frankly, under 859 and 860, I would like to start the preliminary hearing, and if there is going to be any

hearing only, and I lose jurisdiction, if I hold the defendants to answer, and you could renew your motion in the Superior Court.

That might be better.

We had better do it that way.

MR. MARTIN: All right.

May this witness be excused?

THE COURT: Certainly.

Thank you very much.

MR. MARTIN: At this time, I would like to file with the court a copy of an immunity order, which has been signed by his Honor, Judge Donahue, and by the witness in the presence of his attorney, the witness being Samuel L.Coleman, which would be the next witness that the People call.

THE COURT: Is Mr. Coleman's attorney present?

MR. GORDON: Walter Gordon.

THE COURT: You will represent Mr. Coleman?

MR. GORDON: At the time that I signed it, the judge hadn't signed it, but I see that it has been signed.

I did witness my client waiving the hearing, pursuant to 1324 of the Penal Code.

MR. MARTIN: The People would call Samuel Coleman.

THE COURT: The court notes, for the record, being filed at this time in the case of People v. Williams and Sims, number A194636, and an order requiring witness to answer questions, pursuant to Section 1324 of the Penal Code, signed by the Honorable Burch Donahue, whose signature I recognize, dated April 17, 1979, ordering Samuel Coleman to answer such

questions, produce such evidence, by testifying fairly and in good faith, as to his knowledge of the facts from which the charge arose in this case.

Do you want this filed with the file here?

MR. MARTIN: Yes.

MR. GORDON: He said that he would like to speak to me for a moment.

THE COURT: Certainly.

It is about time for a recess, anyway.

We will take about a 5 minute recess.

(Recess taken.)

THE COURT: Mr. Gordon, if you wish, you may sit here with your client.

The record will show the presence of the witness' attorney, Mr. Walter Gordon.

SAMUEL L. COLEMAN,

called as a witness by the People, was sworn and testified as follows:

THE CLERK: Raise your right hand to be sworn.

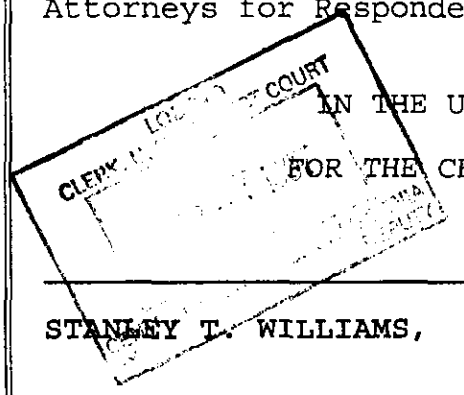
You do solemnly swear that the testimony you may give in the cause now pending before this court shallbe the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: State your name for the record, and spell your last name.

THE WITNESS: Samuel L. Coleman, C-o-l-e-m-a-n, and my

Daniel E. Lungren
Attorney General
George Williamson
Chief Assistant Attorney General
Carol Wendelin Pollack
Senior Assistant Attorney General
Keith H. Borjon
Supervising Deputy Attorney General
Emilio Eugene Varanini IV
Deputy Attorney General
State Bar No. 163952
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2286
Attorneys for Respondents



IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

STANLEY T. WILLIAMS, Petitioner, v. **ARTHUR CALDERON, WARDEN OF SAN QUENTIN, ET. AL.,** Respondents.	**CAPITAL CASE** CV 89-0327 SVW **NOTICE OF AND MOTION FOR EARLY SUMMARY JUDGMENT/ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES AND EXHIBITS IN SUPPORT** Hearing: April 28, 1997* Time: 1:30 p.m.

*[Hearing date will be reset pursuant to an expected stipulation to July 14, 1997 with the permission of the Court].

6. Summary Judgment Should Be Granted As To Claim F -- Petitioner's Suppression/Misconduct Claim That James Garrett Entered Into A Separate Plea Agreement With The District Attorney's Office -- By Which Garrett Agreed To Testify In Petitioner's Case In Exchange For Sentencing Leniency In His Own Pending Cases -- Which Was Not Disclosed At Petitioner's Trial

Petitioner essentially claims that, contrary to James Garrett's testimony at trial, the District Attorney's Office had made promises to help him out on his receiving-stolen property case and his extortion case, both of which were awaiting sentencing at the time of petitioner's trial, in exchange for his testimony at petitioner's trial. *See* petn., at 29:9-17 - 32:1-22.

This claim rests on the following chain of alleged facts: James Garrett had two cases pending at the time of petitioner's trial, one for extortion and the other for receiving stolen property. In October of 1979, he pled guilty to one count of compounding a felony on his extortion case. In January of 1980, he pled guilty to one count of receiving stolen property in his receiving stolen property case. Jury selection began in petitioner's case in January of 1981. At petitioner's trial, Garrett testified that he was not receiving any benefits for testifying against petitioner. On April 14, 1981, petitioner was sentenced to death. On May 8, 1981, Garrett was sentenced on the

compounding a felony charge to four years probation with no jail time. On September 9, 1981, Garrett was sentenced on the receiving stolen property charge to four years probation with no jail time. At the plea hearing on that latter charge, the now late Judge Gadbois referred to a 30 minute conversation he had with the deputy district attorney who tried petitioner's case as making him "very easy" about the plea bargain in Garrett's case. *See* petn., at 30:11-28 - 31:1-17; Doc. VI.A.1., Exh. 1. From this chain of alleged facts, petitioner posits that the *timing* of Garrett's sentences in the two cases, combined with Judge Gadbois's statement, supports an *inference* that, contrary to Garrett's testimony, he had received promises from the prosecution in exchange for his testimony. *See* petn., at 31:21-24 - 32:1-3.

However, as a matter of law, petitioner cannot prevail on this issue for he must allege facts sufficient to show not just an inference that an undisclosed agreement might have been made, by which Garrett's sentences in his two pending cases would be and was given as a reward for his testifying in petitioner's trial, but that such an undisclosed agreement was actually reached between Garrett and the District Attorney's Office in one case and between Garrett and the Office of the Attorney General of the State of California in the other. In any event, even if such an undisclosed plea agreement had been reached between Garrett and the District Attorney's Office and/or between Garrett and the Attorney General's Office, the failure to disclose that agreement did not materially affect the verdict in light of

Garrett's extensive impeachment, Garrett's testimony regarding his plea agreement in his two cases and his expectation via his attorney that he would only receive county jail time as to his receiving stolen property case, Garrett's admission that he subjectively expected to receive a benefit for his disclosure of information concerning petitioner even if no one had promised him such, and the overwhelming evidence of petitioner's guilt and suitability for the death penalty.

a. The Facts In The State Court Record Involving Garrett's Testimony

On February 10, 1981, at a conference outside the purview of the jury, *the deputy district attorney informed the state trial court that defense counsel had the following information*: First, Garrett was convicted of a robbery in New Jersey and had that sentence commuted by the governor. Second, *James Garrett had pled guilty to receiving stolen property in one case and compounding a felony in another; that the Attorney General's Office was handling the second case involving compounding a felony, and that the deputy district attorney did not have any knowledge of what promises were made in that case, but that "certainly" the judge and attorneys involved in that case were aware of petitioner's case; that James Garrett had been promised through his attorney in the first case involving receiving stolen property that he would only receive county jail time; and that*

his wife Esther Garrett had received a promise of straight probation. RT 1360-1361.

On February 17, 1981, James Garrett began testifying in petitioner's case. RT 1648. He testified to the following, that he had pled guilty to receiving stolen property and to compounding a felony in two different cases (RT 1649); *that his pleas had been made pursuant to a plea bargain and that he had been told he would receive a year of county jail time in each case* (RT 1649-1650); *that, on March 14, 1979, he had offered information that he had about petitioner's role in the Brookhaven motel murders to the Los Angeles County Sheriff's Office in the hope of getting a benefit with respect to the charges pending against him* (RT 1657, 1670-1672); that he was told his wife, Esther, would be given three years probation for the receiving stolen property charges against her if he testified in some insurance cases (RT 1650-1651); *that neither he nor his wife had yet been sentenced (RT 1651, 1740-1741); and that no one had promised him a break for his testimony in this case nor suggested that it would look good if he testified against petitioner (RT 1786-1787).*[54/]

Garrett further testified that, with respect to his pending cases of receiving stolen property and compounding a felony that, in two robberies, he stole 114 guns and sold them (along with a trunkload of stolen liquor) to the FBI which

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54. In addition, Garrett testified about his conviction in New Jersey for armed robbery, a conviction on which he served a state prison sentence. RT 1651.

arrested him (RT 1656, 1749-1757); that, from 1978 to 1979, he and another person, who was later found dead, committed insurance frauds by staging freeway accidents, and selling the cases to attorneys and doctors (RT 1658, 1663, 1760); that he was involved in 125 accidents, had 40 driver's licenses, and received $5,000 (RT 1659-1660, 1761, 1763); that he had four receiving stolen property charges filed against him on the case on which he pled guilty to one count of receiving stolen property -- one count which involved a stolen 1977 Continental, one count which involved a 1972 International truck with 245 cases of wine, one count which involved a 1973 Jaguar and a batch of credit cards, and one count which involved 57 handguns (RT 1780-1781); that, in 1979, because Garrett and his wife were facing receiving stolen property charges, he tried to help himself and his wife by agreeing to work with the Los Angeles County District Attorney's Office to set up an insurance fraud case (RT 1664-1666); that he was to set up the sale of such a case to a specific attorney, but that he tried, at the same time, to extort $80,000 from that attorney in return for his lying in court against the investigators from the District Attorney's Office (RT 1667-1668, 1759); and that this scheme backfired resulting in his being arrested by the Attorney General's Office and in his being charged with extortion (RT 1669-1670).

Finally, the prosecutor, in his closing argument in the guilt phase of petitioner's trial, stated that *Garrett was not testifying here because he was a good citizen reporting a crime, but rather, according to the prosecutor, because Garrett hoped or*

believed he was "going to get a break here somehow. They may not promise me anything at the onset, but I'm going to get a break some place, unless they have solved this crime. [¶] And, sure enough, he gets a break" because his wife would be placed on probation. RT 2969.

b. Because Petitioner Has Not Alleged -- And, From A Review Of The State Court Record, Cannot Allege, That An Actual Plea Agreement Did Exist By Which Garrett Testified At Petitioner's Trial In Exchange For Leniency At His Sentencing, No Triable Issue Of Material Fact Exists As To This Claim

Federal law is clear on this point: a claim of failure to disclose exculpatory evidence, or by extension a claim that false testimony was proffered as to the existence of such evidence, cannot be based on *speculation* that such evidence might exist. *Wood v. Bartholomew*, ___ U.S. ___, 116 S. Ct. 7, 10, 133 L. Ed. 2d 1 (1995) (*per curiam*); *see Williams v. Calderon*, 52 F.3d at 1474-75; *People v. Hayes*, 52 Cal.3d 577, 612-13, 276 Cal.Rptr. 874 (Cal. 1990), *cert. denied*, 502 U.S. 958 (1991). It therefore logically follows that an undisclosed plea agreement cannot be deemed to exist where the sole evidence is a witness's subjective belief that he would receive a benefit on his case in exchange for his testimony in another case (*Williams v. Calderon*, 52 F.3d at 1475; *Hayes*, 52 Cal.3d at 613), or where the sole evidence is the subjective belief of the witness's attorney that the witness

would receive a benefit on his case in exchange for his testimony in another case (*Alderman v. Zant*, 22 F.3d 1541, 1553-1555 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1181, 130 L. Ed. 2d 1133 (1995)), or even where the evidence was conflicting as to whether the prosecution offered an undisclosed plea deal to a witness but where that witness did not perceive that he had been made such a deal (*Williams v. Calderon*, 52 F.3d at 1475).

Even at first glance, nowhere does petitioner proffer any evidence (i.e. in a plea transcript or witness affidavit) of the existence an actual agreement, express or implied, that Garrett would receive leniency at his sentencing in exchange for his testifying at petitioner's trial. Instead, petitioner would invite this Court to bridge that void by speculation -- even though he himself has failed to do so -- by providing any evidence of an actual agreement between Garrett and the District Attorney's Office and/or between Garrett and the Attorney General's Office. But, as noted above, speculation may not form the basis of a failure to disclose/false testimony claim. And if a witness's subjective belief that he would receive favorable treatment in exchange for his testimony, a witness's lawyer's subject belief that his client would receive favorable treatment in exchange for his testimony client's, or even conflicting evidence as to the existence of such an agreement is not enough to bridge that void, it can be fairly reasoned that speculation as to the timing of Garrett's sentencing and as to the rationale behind the deputy district attorney in petitioner's case having called the now-late Judge Gadbois on Garrett's apparent behalf

after the close of petitioner's trial cannot do so either. *Accord, People v. Hayes*, 52 Cal.3d at 613.

Because no triable issue of material fact exists as to petitioner's claim that the prosecutor failed to disclose the existence of a plea agreement with Garrett and solicited false testimony from Garrett as to the existence of that agreement, summary judgment is ripe here.

c. Even If An Undisclosed Plea Agreement Did Exist Here, Failure To Disclose That Agreement Or The Proffering Of False Testimony About The Existence Of That Agreement Did Not Have A Material Impact On Petitioner's Case Under Generally Applicable Federal Precedent

Both the failure of a state prosecutor to disclose material evidence favorable to an accused and the knowing use of perjured testimony against an accused by a state prosecutor constitute alternative sides of the same coin, namely a violation of that accused's due process rights. *Kyles*, 115 S.Ct. at 1565; *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Such evidence includes impeachment evidence. *Giglio*, 405 U.S. at 154-155; *Gilday v. Callahan*, 59 F.3d 257, 267 n.8 (1st Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1269, 134 L. Ed. 2d 216 (1996); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir. 1992). However, the Constitution is not violated every time the prosecution fails to disclose

evidence that may be helpful to a defendant, nor have the courts ever held that the Constitution demands an open-door policy. *Kyles*, 115 S.Ct. at 1567.[55]

A conviction may be set aside for the failure to disclose exculpatory evidence only where the undisclosed evidence in question is *material*, that is only where a "reasonable probability" exists that had the evidence been disclosed the result at trial would have been different. *Wood*, 116 S. Ct. at 10; *Kyles*, 115 S. Ct. at 1565-66. Alternatively phrased, favorable evidence is regarded as being material if the failure to disclose such evidence undermined confidence in the outcome of the trial. *Kyles*, 115 S. Ct. at 1566; *accord, Banks v. Reynolds*, 54 F.3d 1508, 1521 (10th Cir. 1995). However, the *materiality of the undisclosed evidence must be evaluated in light of the entire record, that is in terms of its utility to the defense as well as its potentially damaging impact on the prosecution, in order to determine whether it puts the whole case in a different light. See Kyles*, 115 S. Ct. at 1566; *Agurs*, 427 U.S. at 112; *Banks*, 54 F.3d at 1518. This will be referred to as the *Kyles* standard.

On the other hand, the knowing use of false testimony violates the Constitution if there exists any reasonable likelihood that the false testimony could have affected the

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55. Nor does it matter whether the deputy district attorney knew that false testimony was given. A state prosecutor may be held liable for the knowing use of perjured testimony even if he did *not* know that it was in fact perjured or false testimony if *he should have known* that it was false i.e., when anoher member of the prosecution team knows of its falsity *United States v. Agurs*, 427 U.S. 97, 103-104 (1976); *accord, Kyles*, 115 S. Ct. at 1565.

judgment of the jury. *Kyles*, 115 S. Ct. at 1565 n.7; *Agurs*, 427 U.S. at 101; *Gilday*, 59 F.3d at 267; *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). Phrased another way, the relevant inquiry would be whether no reasonable jury would be affected by the undisclosed information. *Gilday*, 59 F.3d at 269. This will be referred to as the *Agurs* standard.[56] Although the *Agurs* standard is less onerous on a defendant than the *Kyles* standard (*see Gilday*, 59 F.3d at 267; *Kirkpatrick*, 992 F.2d at 497), the *Agurs* standard, in contrast the *Kyles* standard, is subject to harmless error review under *Brecht*, 507 U.S. 619.

The rationale for treating these two types of error differently is as follows. In *Kyles*, the United States Supreme Court concluded that the failure to disclose material evidence could not subjected to harmless-error review because the determination of whether undisclosed evidence was material *a fortiori* entails the judicial conclusion that the undisclosed evidence would have had an impact on the jury sufficiently substantial enough to satisfy *Brecht*. *Kyles*, 115 S. Ct. at 1566; *Gilday*, 59 F.3d at 267-268.

Kyles itself refused to address the question of whether the same reasoning would be applicable with respect to the knowing use of perjured testimony. *Kyles*, 115 S. Ct. at 1565

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56. Admittedly, respondents carry the burden of establishing the lack of materiality of evidence as to the Kyles standard, and apparently as to the Agurs standard as well. *See Kyles*, 115 S. Ct. at 1568; *Agurs*, 427 U.S. at 108; Banks, 54 F.3d at 1517 & nn. 19, 20; *but see* Gilday, 59 F.3d at 268 (court implied that the defendant carried the burden of proof under the *Agurs* standard).

n.7. However, *Gilday* persuasively reasoned in this respect that a different analytical situation presents itself here because a court can find the less onerous standard of materiality necessary to establish a Constitutional violation here, namely whether a reasonable jury could have been affected, without finding an impact on the jury which would be sufficiently substantial enough to satisfy *Brecht*. *See Gilday*, 59 F.3d at 268. It therefore follows that even if petitioner shows that the alleged knowing use of false testimony violated his constitutional rights because any reasonable jury would have been affected by the nondisclosed testimony, petitioner cannot obtain habeas relief here if *Brecht* is not met; that is if it is more likely than not that the error had no effect on the verdict. *See Henry*, 33 F.3d at 1041; *McAllister*, 747 F.2d at 1277.

In any event, under either the *Kyles* materiality analysis or the *Agurs* materiality analysis, the result is the same. Petitioner does not have a claim worthy of federal habeas relief as a matter of law in either event.

In the first instance, it is noteworthy that the allegedly undisclosed evidence failed to shed any new light on the crime or on petitioner's involvement in the crime as in *Kyles*. See *Kyles*, 115 S. Ct. 1569-1574 & n.13. Rather, it went to the credibility of Garrett. And, undisclosed evidence relating to Garrett's credibility would have not had the same impact on the jury as that occasioned by undisclosed evidence bearing on petitioner's theory of the case. *See Gilday*, 59 F.3d at 272 (less likely that undisclosed evidence relating to credibility of witness would

have impact on jury than undisclosed evidence which made defense theory factually more likely).

Moreover, allegedly withheld evidence which is cumulative is inherently nonmaterial. *See Banks*, 54 F.3d at 1517; *see also Gilday*, 59 F.3d at 271 (although withheld impeachment evidence was undeniably much more potent in terms of assailing a witness' credibility, some impeachment did take place of that witness in the course of the trial such that he had already been sullied). In that regard, the allegedly withheld plea agreement between Garrett and the District Attorney Office/Attorney General's Office to obtain further leniency in his sentencing on his pending cases would have been quite cumulative of the extensive impeachment evidence handed over to defense counsel and introduced at petitioner's trial.

At petitioner's trial, for example, Garrett testified that he had pled guilty to receiving stolen property and to compounding a felony in two different cases (RT 1649); that *his pleas had been made pursuant to a plea bargain and that he had been told he would receive a year of county jail time in each case* (RT 1649-1650); *that, on March 14, 1979, he had offered information that he had about petitioner's role in the Brookhaven motel murders to the Los Angeles County Sheriff's Office in the hope of getting a benefit with respect to the charges pending against him* (RT 1657, 1670-1672); that he was told his wife, Esther, would be given three years probation for the receiving stolen property charges against her if he testified in some insurance cases (RT 1650-1651); and *that neither he nor his wife*

had yet been sentenced (RT 1651, 1740-1741).[57] Furthermore, in his final argument, the deputy district attorney referred to James Garrett as a fellow crook (RT 2959), extensively catalogued his crimes, and then made the following argument: "Why does he [Garrett] tell his story to the police? Is he a good citizen, coming down to report crime? No. He knows three murders. 'I have information about it. I know who did it. I'm going to get a break here somehow. They may not promise me anything at the onset, but I'm going to get a break some place, unless they have solved this crime.'" RT 2969. Garrett's crimes, motive, and character -- not to mention his hope of receiving breaks on his pending cases -- was thoroughly displayed to the jury. The disclosure of the alleged agreement would not have presented a significantly different portrait *to the jury* of Garrett than that which appears in the record.

Last, the disclosure of this additional impeachment evidence of Garrett's testimony would not have affected the verdict in any event in light of the overwhelming evidence of petitioner's guilt. Frankly, even in the complete absence of Garrett's testimony, the jury almost certainly would have found petitioner guilty and sentenced him to death. Even aside from Garrett's testimony, the jury had the testimony of Coward on the 7-Eleven murder, the testimony of Coleman and Oglesby on the Brookhaven motel murder, the testimony of Esther Garrett on both

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57. In addition, after the court overruled an objection by defense counsel (RT 1654), Garrett testified in detail on both direct examination and cross-examination about the facts which gave rise to these cases (RT 1656-1670).

murders, evidence of petitioner's consciousness of his guilt in the form of his detailed plans of escape from county jail, and the testimony of the firearms expert that one of the shotgun shell casings found at the scene of the Brookhaven Motel murder could only have been fired from a shotgun purchased by petitioner.

Consequently, even assuming petitioner's allegations to be true, he cannot receive relief because the allegedly undisclosed agreement would not have had a material impact on the verdict. Therefore, this claim would be quite suitable for early summary judgment.[58/]

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58. Insofar as petitioner bases this claim on purported errors of state law (i.e. violation of Penal Code section 1473 and the state constitution) early summary adjudication of these issues would be appropriate here. After all, petitioner presented the state law components of this claim to the California Supreme Court -- the final expositor of state law -- in 1994 in his fourth state habeas petition (Doc. VI.A.1., at 18-23) -- and the California Supreme Court rejected this claim on its merits in 1995 (Doc. VI.C.1). *Melguin*, 38 F.3d at 1482; *Peliter*, 15 F.3d at 862; *see Moran v. McDaniel*, 80 F.3d at 1268.

Petitioner also mentions that his factual allegations make out constitutional violations of the Sixth and Eighth Amendments. *See* petn., at 29:9-14. Early summary adjudication would be equally appropriate here. The right of the defense to receive materially exculpatory evidence derives from the due process clause of the Fourteenth Amendment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Aside from *Brady*, a defendant has no constitutional right whatsoever to discovery. *Gray*, 116 S. Ct. at 2084. Moreover, petitioner has failed at any stage in state or federal proceedings to identify any cases which would suggest that the Sixth and Eighth Amendments apply in this context. *See Jones*, 66 F.3d at 205; *James v. Borg*, 24 F.3d at 26.

In the final analysis, the apparent absence of any authority suggesting that the Sixth or Eighth Amendments apply at all in this context (or do so in a fashion different from the Due Process Clause) would suggest at the very least that any application of the Sixth or Eighth Amendments (or that any review of state law issues here) would be a novel one and thereby barred under *Teague v. Lane*.

Excerpt re Claim F from Petitioner's Opposition to Motion for Early Summary Judgment/Adjudication in U.S.D.C. Central District case number CV 89-0327-SVW (filed July 14, 1997)

SER 631 - 645

MARIA E. STRATTON
Federal Public Defender
C. RENÉE MANES
Deputy Federal Public Defender
JULIE E. TASCHETTA
Deputy Federal Public Defender
Edward Roybal Federal Building
255 East Temple Street, Suite 167
Los Angeles, California 90012
Telephone (213) 894-7519

Attorneys for Petitioner,
STANLEY T. WILLIAMS

Dated July 14, 97

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STANLEY T. WILLIAMS, Petitioner, v. ARTHUR CALDERON, in his capacity as Warden, California State Prison at San Quentin, Respondent.	NO. CV 89-0327 SVW **DEATH PENALTY CASE** **PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR EARLY SUMMARY JUDGMENT/ADJUDICATION** **Filed Herewith:** **Submission of Exhibits in Support of Petitioner's Opposition to Respondent's Motion for Early Summary Judgment/Adjudication And Accompanying Declaration of Counsel, C. Renée Manes** **Statement of Genuine Issues of Material Fact** Hearing Scheduled: Date: October 6, 1997 [current] Time: 1:30 p.m. Crtrm: 6 [1439]

CLAIM F: THE PROSECUTION UNLAWFULLY SUPPRESSED EVIDENCE RELEVANT TO JAMES GARRETT, ITS PRIMARY WITNESS AGAINST PETITIONER.

In this claim, Mr. Williams contends that the prosecutor committed misconduct in presenting the testimony of James Garrett both without disclosing the existence of a deal for that testimony, and allowing Garrett to lie on the stand when he denied such a deal existed.[33] In moving for summary adjudication, Respondent launches into a lengthy diatribe about what Garrett testified to at trial with regard to the agreements he had supposedly reached with the various arms of prosecution with which he was involved. [*SJ Motion*, 170:13-173:5.] Respondent cites this "evidence", Garrett's self-serving testimony, as uncontroverted proof that no deal was reached in exchange for testifying in Mr. Williams' case. But there is no reason to believe Garrett's testimony is accurate or true. As Respondent continuously points out, Garrett was a known criminal who had been in trouble with the law for many years. [*SJ Motion*, 172:24-173:5; 179:15-180:15.] There is simply no reason to give his testimony at Mr. Williams' trial any credibility, much less conclusive credibility, especially when it is contrasted with the evidence that such a was made presented by Mr. Williams.

1. Respondent's Interpretation Of Case Law Is Plainly Erroneous.

Respondent insists James Garrett was an honest credible witness. [*SJ Motion*, 168:24-26.] In support of that contention, Respondent notes that Mr. Williams does not have a physical copy of

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[33] While James Garrett is the witness who would have both obtained the deal and lied about its existence, his deal also benefitted the interests of his wife, Esther, and also implicated her testimony.

an agreement with the state. [*SJ Motion*, 169:15-23.] While Mr. Williams may not have such a singular document at this time, significant evidence that an agreement were reached has been obtained and is being presented to this Court.[34]

This evidence includes:

(1) the multiple complaints and charges that had been filed against the Garretts prior to Mr. Williams' trial [People v. James and Esther Garret, Felony Complaint in Case No. A342090 (03/15/78), Exh. 76; People v. James Garrett and Perry L. Hicks, Information (06/26/79), Exh. 83];

(2) the probation reports on both of the Garretts which recommended prison time for the serious felonies which they had committed [Esther Garrett Probation Report (1979), Exh. 78; James Garrett Probation Report A342090 (1981), Exh. 96; James Garrett Probation Report A344683 (1981), Exh. 93];

(3) the memorandum on James Garrett's informant activities requested by the prosecutor in Mr. Williams' trial [Memorandum Re: James Paul Garrett, File No. 79-F-0696 (08/08/79), at 2, Exh. 84];

(4) the billing record for the Garretts' counsel which both noted the existence of a "deal" prior to Mr. Williams' trial, and thereafter had numerous entries showing conversations with the prosecutor on Mr. Williams' trial, efforts by this counsel to keep track of Mr. Williams'

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[34] Mr. Williams does intend to seek discovery of both prosecution files and files from Garretts' trial lawyers to obtain a specific copy of any agreement.

trial date, and attendance by Garrett's counsel at Mr. Williams' trial on the days the Garretts testified [Garretts' Billing Records, Exh. 99];

(5) documents establishing that the Garretts entered guilty pleas on January 14, 1980 [*Id.*, at 2; Report(s) to Judicial Counsel of Sentence Choice Other than State Prison in People v. James and Esther Garrett, Case No. A342090 (09/15/81), Exh. 98], yet their sentencing was repeatedly continued until after the completion of Mr. Williams' trial, over a year later [*see e.g.* Letter of Charles English to C.A.I. Probation (12/09/81), Exh. 89];

(6) documents establishing that James Garrett's sentencing in one of the pending matters followed immediately after the completion of Mr. Williams' trial [People v. James Garrett, Case No. A344683, Reporter's Transcript (05/08/91), Exh. 94];

(7) evidence that both Garretts were sentenced on the other pending felonies a few months after Mr. Williams' trial was completed [People v. James and Esther Garrett, Case No. A 342090, Reporter's Transcript (09/09/81), Exh. 97];

(8) evidence that the judge noted both the age of the case against the Garretts, and that Garrett had been "very helpful to the District Attorney's office" in "one enormous case", and that the prosecutor in Mr. Williams' trial had talked with this Court for an hour-and-a-half before the sentencing about the Garretts' efforts [*id.*];

(9) evidence that neither of the Garretts spent any time in prison or jail, in spite of the probation reports' recommendations of prison time, and in spite of James Garrett's claim at Mr. Williams trial that he would spend one year in on his pending felonies [*id.*]; and,

(10) what evidence is available to establish that the Garretts did not testifying in any other matter between the date of Mr. Williams' trial and their sentencings in these matters. [Letter from the State Bar of California, with enclosures (05/30/97), Exh. 111; Letter from State of California, Department of Justice (06/09/97), Exh. 112.]

In spite of this vast body of circumstantial evidence establishing that the Garretts' obtained an undisclosed deal for their testimony, under Respondent's version of the law, Mr. Williams cannot prevail unless he proves with a specific document the actual existence of an agreement which was reached but not disclosed between the Garretts and the various district attorneys and attorney generals in this case and all of the matters in which the Garretts were involved. [*SJ Motion*, 169:15-23.] This is a confused, if not tortured, reading of the law.

Respondent claims "federal law is clear on this point: a claim of failure to disclose exculpatory evidence . . . cannot be based on speculation that such evidence might exist." [*SJ Motion*, 173.] But the cases cited do not support this position. In Wood v. Bartholomew, ___ U.S. ___, 116 S.Ct. 7, 10-11, 133 L.Ed.2d 1, *reh'g. denied* ___ U.S. ___, 116 S.Ct. 583, 133 L.Ed.2d 505 (1995), *on remand* 96 F.3d 1451 (9th Cir. 1996), the Supreme Court reversed a Ninth Circuit decision granting a writ of *habeas corpus* on a

claim of nondisclosure. The Court found the state's failure to disclose that one of its witnesses had failed a polygraph test did not deprive the petitioner of material evidence at his trial, primarily because such tests are not admissible under Washington state law. Since the results were not admissible, the Court found they could not possibly have affected the outcome of the trial, and took the Ninth Circuit to task for speculating that they could. The discussion of speculation was extremely limited and was directed specifically to the Ninth Circuit Court of Appeals for its decision in this case: "[The Court of Appeals] judgment is based on mere speculation, in violation of the standards we have established." Wood v. Bartholomew, *supra*, 96 F.3d at 10. Thus, Bartholomew does not stand for the holding Respondent argues.

The next case cited by Respondent, Williams v. Calderon, *supra*, 52 F.3d 1465, is similarly distinguishable. In Williams, the petitioner contended the prosecution failed to disclose a deal it had cut with its primary witness in exchange for his testimony against petitioner, then allowed the same witness to perjure himself by denying he had been made any promises. Williams v. Calderon, *supra*, 52 F.3d at 1474. While the court denied the first claim, the crucial difference is that this denial was based on the court's conclusion, *after a full evidentiary hearing*, that no deal existed. Furthermore, the Williams court did not hold, as Respondent has represented, that such a claim must be conclusively proven before any discovery is granted or any hearing held. Williams simply held that, in the face of conflicting testimony presented at the evidentiary hearing, the district court could

reasonably conclude that no deals had been reached. Williams v. Calderon, *supra*, 52 F.3d at 1474-75.

Respondent's citation of Alderman v. Zant, 22 F.3d 1541 (11th Cir. 1994), *reh'g. denied* 29 F.3d 643 (11th Cir.), *cert. denied sub. nom.* Alderman v. Thomas, 513 U.S. 1061, 115 S.Ct. 673, 130 L.Ed.2d 606 (1994), is puzzling. In that case, the petitioner argued the prosecution entered into an implicit understanding with its key witness that he would be sentenced to life in prison, as opposed to death, if he testified against the petitioner at trial. Alderman v. Zant, *supra*, 22 F.3d at 1548. However, the claim lacked merit on its face: the witness in question was convicted and sentenced to death. Alderman v. Zant, *supra*, 22 F.3d at 1550 n.8. Here, in contrast, both Garretts received probation in lieu of the prison sentence recommended by the probation department. Furthermore, Alderman, like the Williams case, was decided only after a full and fair evidentiary hearing on the subject wherein the district court was able to make "specific credibility and factual findings," an opportunity Mr. Williams has never been afforded. Alderman v. Zant, *supra*, 22 F.3d at 1554.

In fact, a careful reading of the cases cited in Alderman directly refute Respondent's argument that Mr. Williams' claim must be dismissed because he cannot, at this time, produce evidence of an agreement. *See* Alderman v. Zant, *supra*, 22 F.3d at 1554, *citing* Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985) (the phrase "any understanding or agreement" not limited to *bona fide* enforceable grants of immunity; "Even mere 'advice' by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence since it

constitutes an informal understanding which could directly affect the witness's credibility").

Respondent complains at length about Mr. Williams' alleged lack of evidence for this claim, but fails to address the significant evidence which has already been obtained. While Mr. Williams may not have a single document which is "the deal", the evidence already obtained is sufficient to allow a court to determine that a deal did, in fact, exist. Further, it is possible that "the deal" will emerge once discovery is granted on this claim.

2. Mr. Williams Was Prejudiced By The State's Failure To Disclose This Evidence.

It is well-established under Brady v. Maryland, *supra*, that the state has an affirmative duty to disclose evidence favorable to the defense and the prosecution's suppression of evidence that is favorable to the accused violates due process where that evidence is material to guilt or punishment. Over the years, the Brady standard has been fine-tuned, such as in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Bagley held that, whether or not the defense requests exculpatory evidence, constitutional error results if there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different. Bagley, *supra*, 473 U.S. at 473 U.S. at 682. Then, in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court further clarified the Brady inquiry. It discussed four aspects of the materiality query

under Bagley. Kyles, *supra*, 115 S.Ct. at 1565. All of those have been misconstrued by Respondent and warrant discussion here.[35]

A showing of materiality does not require Mr. Williams to demonstrate by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in an acquittal. Kyles, *supra*, 115 S.Ct. at 1566. Rather, the "touchstone of materiality" is a "reasonable probability" of a different result had the evidence been disclosed. *Id.* A reasonable probability of a different result is shown when the result of the suppression "undermines confidence in the outcome of the trial." Kyles, *supra*, 115 S.Ct. at 1566, *quoting* Bagley, 473 U.S. at 678. As Respondent admits, evidence impeaching the testimony of a government witness falls under the Brady rule when the reliability of that witness could be determinative of guilt or innocence. United States v. Brumel-Alvarez, 991 F.2d 1452, 1458 (9th Cir. 1992). [*SJ Motion*, 175:22-26.]

The essence of the state's case against Mr. Williams was the testimony of Garrett. Clearly, the Garretts were significant witnesses in this case whose credibility with the jury bore greatly on the determination of Mr. Williams' guilt. Any agreement reached by an arm of the prosecution with the Garretts would therefore have been relevant and material because it would have gone a long ways toward the adequate impeachment of these witnesses. Respondent's lack of understanding of this concept is clear in his contention that, since this evidence did not "shed new light on the crime" but

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[35] While Kyles was not yet decided at the time of Mr. Williams' trial, it is pertinent here because the principles discussed in that case simply further illuminate those set forth in Brady, which was controlling in 1981.

only "went to the credibility of Garrett" it does not qualify as material under Brady, and therefore its nondisclosure had no bearing on Mr. Williams' trial. [*SJ Motion*, 178:19-21, attempting to distinguish Kyles from the instant case.]

This case bears marked resemblance to Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In Giglio, the Court reversed a conviction after finding a Brady violation for failure to disclose a plea agreement with the government's key witness. In that case the government's case depended almost entirely on that witness' testimony. The witness' credibility was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it. Giglio, *supra*, 405 U.S. at 154-55. For those reasons, the Court reversed and remanded the case and ordered a new trial.

Similarly, in United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996), the Ninth Circuit reversed and ordered a new trial based on the government's nondisclosure of pertinent information about the activities of its key witness. The withheld evidence, discovered by the defense long after trial, indicated the witness was engaged in ongoing criminal activities and owed the defendant money, giving him a motive to lie. Steinberg, *supra*, 99 F.3d at 1491. The court found error and ordered a new trial notwithstanding the fact that the witness' credibility was explored during the trial through various questions relating to a plea agreement he had made with the government in exchange for his testimony. The court also discussed the lack of corroboration of the witness' testimony. In the end, the court granted Steinberg a new trial

because evidence that the government's key witness at trial was engaged in ongoing criminal activity and owed the defendant money was relevant to his credibility, and the defendant was entitled to let the jury know about it; and, there was a reasonable probability, even though not a very strong one, that had the evidence been disclosed, the result of the proceeding would have been different. Steinberg, *supra*, 99 F.3d at 1492.

Mr. Williams' case cannot be distinguished from Steinberg. Moreover, aside from Garrett's wife, Esther, whose testimony was also implicated in the deal, no witness corroborated Garrett's testimony at trial regarding Mr. Williams' purported confessions. The impact of the evidence of the plea agreement would have had the same, or an even greater, impact than the evidence in Steinberg was found to have.

Of course, it is also entirely possible that the prosecutor in this case knowingly allowed Garrett to testify in a false or misleading manner. At the very least, the prosecutor should have realized Garrett's answers to the questions posed about favorable treatment for his testimony were misleading, at best, and "created the distinct impression that there were no discussions on this subject[.]" People v. Westmoreland, 58 Cal.App.3d 32, 129 Cal.Rptr. 554 (1976). This is especially so where the prosecutor in Mr. Williams' case apparently arranged a deal with the judge sentencing Garrett, though he had no other involvement in that matter and, as a general rule, would not have been involved at all. Clearly, the prosecutor knew exactly what was going on. Here, as in Westmoreland:

> It is evident that the prosecutor's failure to clarify [the witness'] misleading testimony amounted to the withholding of material evidence pertaining to the credibility of a key prosecution witness' testimony; because it cannot be said that it is clear beyond a reasonable doubt that the failure did not contribute to the jury's verdict, we must reverse the judgment.

Westmoreland, *supra*, 58 Cal.App.3d at 44. This Court should do the same.

The Brady inquiry is not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, *supra*, 115 S.Ct. at 1566. Respondent insists that disclosure of evidence of an agreement between the prosecution and Garrett would not have benefitted Mr. Williams "in light of overwhelming evidence of [his] guilt." [*SJ Motion*, 180.] Like Respondent, the dissent in Kyles assumed the petitioner had to lose because, after accounting for the suppressed evidence, there would still have been sufficient evidence to convict. Kyles, *supra*, 115 S.Ct. at 1566 n.8. This is not the test, and the opinion in Kyles brought the dissent up short on this point. The Brady analysis does not involve a weighing of the inculpatory and exculpatory evidence introduced at a criminal trial to strike a certain balance indicative of guilt or innocence. Thus, Respondent's citation of the "overwhelming evidence" against Mr. Williams is unavailing.

The third aspect of materiality is the fact that, once a reviewing court has found constitutional error, there is no need for further harmless error review. Kyles, *supra*, 115 S.Ct. at 1566 n.8. This is so because a finding of constitutional error "necessarily entails the conclusion that the suppression must have had [a] substantial and injurious effect or influence in determining the jury's verdict." Kyles, *supra*, 115 S.Ct. at 1566 n.8 (internal quotes and citations omitted). Once an error is found, it cannot be found harmless. Kyles, *supra*, 115 S.Ct. at 1567. Finally, the suppressed evidence must be assessed collectively, not item-by-item. *Id.*

Even if every item of the state's case would have been undercut had the evidence been disclosed, there is enough of an impact to render its suppression constitutional error. James Garrett had, in fact, already been "sullied" by both defense and prosecution in front of the jury. But simple cross-examination of a witness does not have nearly the impeaching effect of a specific plea agreement relating to a witness' testimony in a specific case. An agreement is much more persuasive. Furthermore, the impact of this evidence, which would have implicated the testimony of both James and Esther Garrett, combined with the other impeachment of James Garrett, could have made the difference between a guilty verdict and an acquittal. *See* Steinberg, *supra*, 99 F.3d at 1491 ("although the question is a close one, we hold that the withheld evidence undermines confidence in the verdict").

The agreement Garrett reached with the prosecution rose to the level of critical impeachment evidence to which, under Brady, Bagley, and Kyles, Mr. Williams was entitled. "[T]he prosecution's

responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles, *supra*, 115 S.Ct. at 1567-68. The prosecution in this case did not fulfill this duty. As a result, constitutional error occurred and, as Kyles reiterates, such error is never harmless.

Inasmuch as Respondent contends this claim is one of state law [*SJ Motion*, 181 n. 58], such a contention is refuted by the petition itself. [*Amended Petition*, at 29, invoking "the federal and state constitutions".] Mr. Williams has properly presented the "substance" of the claims to the highest state court and given it a fair opportunity to rule on the merits, as required by Picard v. Connor, 404 U.S. 270, 275-278, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971). The language of the claim presented need not be identical; generally, if the claim relies on the same facts and the same constitutional violation, it has been adequately presented, as the decision in Picard stated: "a failure to invoke talismanic language (cite 'book and verse' of the constitution) should not be the basis for a finding of nonexhaustion." Picard, *supra*, 404 U.S. at 278. The federal quality of the right asserted was adequately discernible to fairly inform the state courts of Mr. Williams' claims. The state courts had the opportunity to hear and pass upon the legal merits of these issues. Therefore, Mr. Williams has not procedurally defaulted his claim.

Respondent's claim that the issue is barred under Teague v. Lane, *supra*, because the citations to the 6th and 8th Amendments are "novel" is just as easily dismissed. Claims under Brady are often paired with a 6th Amendment violation. *See e.g.* United States v. Wilson, 102 F.3d 968, 971 (8th Cir. 1996) (6th Amendment

and Brady claim raised but not properly preserved for review); Aleman v. United States, 878 F.2d 1009, 1011 (7th Cir. 1989) (government's failure to disclose violated 5th and 6th Amendments and Brady); United States v. Allesio, 528 F.2d 1079, 1081 (9th Cir.), *cert. denied* 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976)(6th Amendment raised with Brady where government refused to exercise power to grant immunity). This argument is addressed more thoroughly under Claim G, next.

CLAIM G: THE TESTIMONY OF GEORGE OGLESBY WAS ADMITTED IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHTS.

This claim addresses the prosecution's presentation of the testimony of jail-house snitch, George Oglesby, and his allegations regarding Mr. Williams' admissions to him of the crimes and concocting an escape plan. Respondent first argues Mr. Williams' referral to the 8th and 14th Amendments in this claim is "place-filing [*sic*] surplusage." [*SJ Motion*, 182 n.59.] The point Respondent is striving to make here is somewhat confusing, since the single run-on sentence which comprises the first page is incomplete. [*SJ Motion*, 182:13-22.] However, Mr. Williams believes Respondent is arguing this claim involves only the 6th Amendment, and not the 8th or 14th. Respondent suggests that, because Mr. Williams cited those amendments in support of his claim, he has violated the "new rule" proscription of Teague v. Lane, and this claim must be dismissed on that basis. [*SJ Motion*, 182-83 n.59.] Respondent's argument on this point is not supported by the cases cited.